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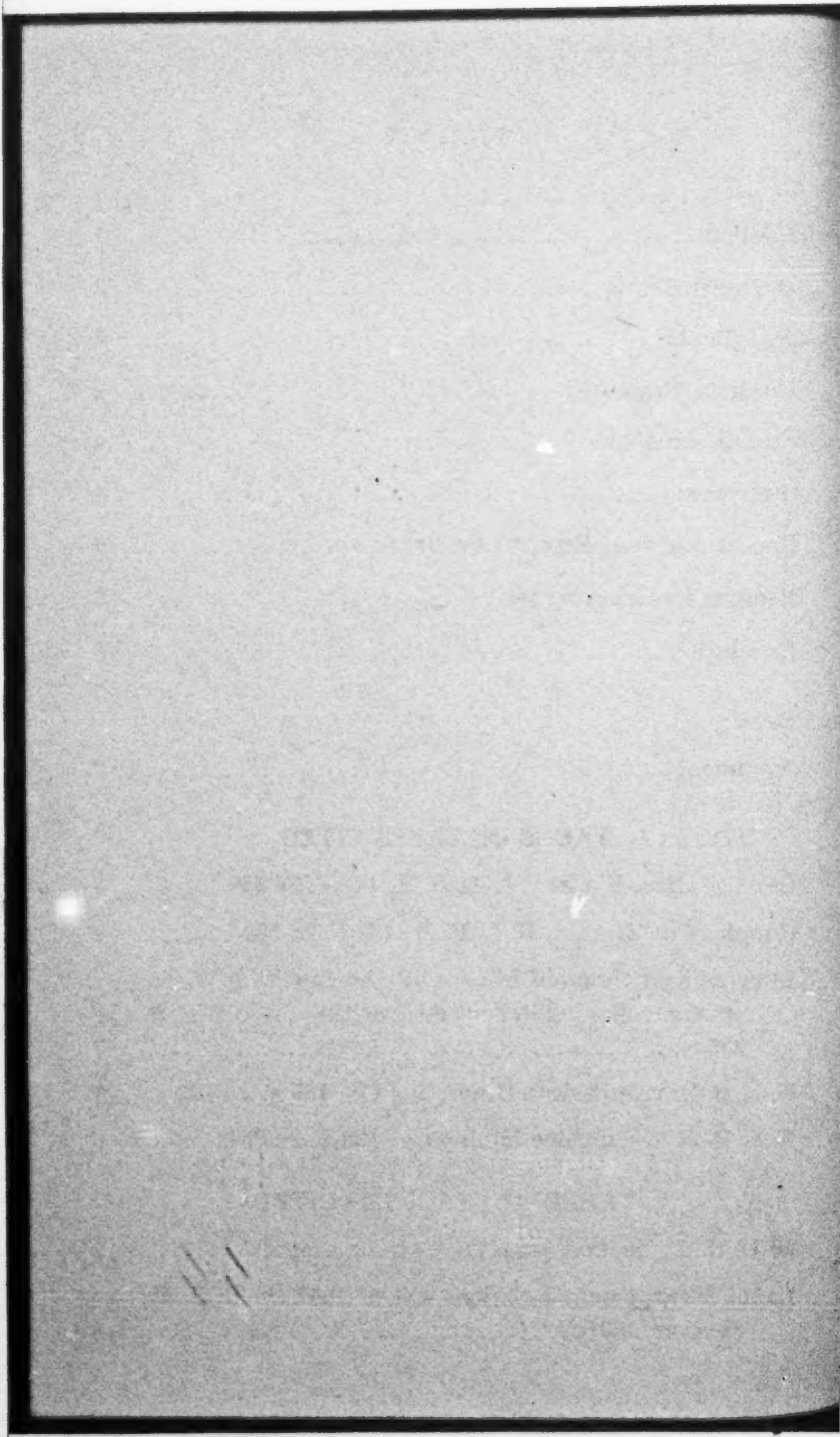


IN THE

SUPREME COURT OF THE UNITED STATES.

No. October Term, 1953.

THE L. B. HOSIERY COMPANY, INCORPORATED and LEE MAISEL, doing business as MYERSTOWN HOSIERY MILLS,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The L. B. Hosiery Company, Incorporated and Lee Maisel, doing business as Myerstown Hosiery Mills pray that a writ of certiorari issue to review the supplemental decree of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 16, 1954.

OPINIONS BELOW.

The National Labor Relations Board's Supplemental Intermediate Report and Recommendations (R. 14a), is unreported. The Supplemental Decision and Order (R. 4a), is reported at 99 NLRB 630. The Supplemental Report on Remand (R. 44a), is unreported. The Second Supplemental Decision and Order (R. 41a), is reported at 102 NLRB 1033. The Supplemental Decree of the Circuit Court of Appeals (R. 76a) has not as yet been reported.

JURISDICTION.

The supplemental decree of the Circuit Court of Appeals was entered on January 16, 1954 (R. 76a). The jurisdiction of this Court is invoked under 28 U. S. C., section 1254 (1).

QUESTIONS PRESENTED.

1. Should the Court of Appeals refuse to hear oral argument and refuse to allow filing of briefs where the cause presents complex issues of fact and law?

2. Has not the Circuit Court sanctioned "feather bedding", acted contrary to the policies of 29 U. S. C. sec. 160, and failed to effectuate the policies of the subchapter as stated in 29 U. S. C. sec. 160(c), by awarding back pay premised on a six man knitter operation, where conclusive uncontroverted testimony established that prior to the alleged discrimination, petitioners decided to change to a three man knitter operation, and respondent admitted in its brief on original proceedings that since the date of the alleged discrimination, a three man knitter operation has been in effect?

3. Is not the cut-off date for back pay the time that an employee manifests the determination not to accept reinstatement if offered rather than the subsequent date of refusal of reinstatement when offered?

4. Has not an employee disqualified herself from back pay where she registers with the United States Employment Service admittedly for the purpose only of receiving compensation and with no intention of gaining other employment, and where she makes no effort to seek other employment?

STATUTE INVOLVED.

Labor Management Relations Act of 1947, 29 U. S. C. section 160(c), which states in part:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees *with or without back pay as will effectuate the policies of this subchapter.* * * *" (Emphasis added.)

STATEMENT.

On April 18, 1951, the United States Court of Appeals for the Third Circuit enforced a decision and order of the National Labor Relations Board ordering petitioners to make whole certain of their employees for losses of pay suffered by reason of petitioner's discrimination against them. Further hearing were ordered by the Board on the issues of the amount of back pay due, and to whom it was due. On February 8, 1952, the Trial Examiner issued his Supplemental Intermediate Report and Recommendations (R. 14a). On June 11, 1952, the Board issued its Supplemental Decision and Order, ordering further hearing as to one of the employees, Garnet. On November 18, 1952, the Trial Examiner issued his Supplemental Report on Remand (R.

4a). On February 5, 1953, the Board issued a Second Supplemental Decision and Order as to Garnet (R. 41a). On December 18, 1953, the United States Court of Appeals for the Third Circuit issued an Order granting the Board's motion for a supplemental decree specifying the amounts of the back pay due, (R. 74a). On January 6, 1954, the Court of Appeals denied petitioners' petition for rehearing (R. 76a), and on January 16, 1954 issued its Supplemental Decree ordering the back pay (R. 76a).

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In refusing oral argument and briefs.

2. In ordering back pay for persons whose jobs were no longer existent.

3. In refusing to cut-off back pay at the time the employees manifested the determination to refuse reinstatement, had it been offered.

4. In ordering back pay for persons who registered with the United States Employment Service for the admitted purpose only of receiving compensation and with no intention of gaining other employment.

5. In enforcing the order of the National Labor Relations Board.

REASONS FOR GRANTING THE WRIT.

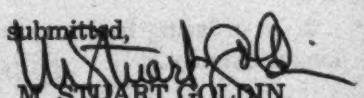
1. The questions presented are of importance in administering the back pay provisions of the Labor Management Relations Act of 1947.

2. Your Honorable Court should intercede where formulae devised by the Board are applied in a harsh manner, calculated to destroy a business, rather than in a manner which would allow for future employment for its present employees.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



M. STUART GOLDIN,
Counsel for Petitioners.

BRIEF.

ARGUMENT.

The business involved in this action is small. Exaction from this business of the sums awarded in the decree will cause its destruction. This will result in an increase of unemployment in the Reading, Pennsylvania, hosiery area, an area suffering now from failures. It does not seem to us therefore, that the Board has effectuated the basic policies of the Act by harshly and mechanically applying formulae, which it has previously devised, to this case.

The questions presented were worthy of the study and consideration of the Court of Appeals; neither oral argument nor briefs were allowed.

Back pay should have been terminated at the points where the employees manifested the open determination to refuse reinstatement if offered (R. 54a-56a). *Cupples Co. Mfgrs. vs. N. L. R. B.*, 106 F. 2d 100, 118. And certainly, since uncontroverted testimony established that certain jobs were no longer existent (R. 54a), back pay should not have been ordered for those non-existent jobs. *Corning Glass Works v. N. L. R. B.*, 118 F. 2d 625, 629; *N. L. R. B. v. American Creosoting Co.*, 139 F. 2d 193, 196. This testimony was by management and refused of belief by the Board in toto (R. 5a-6a). Where the Board refuses to credit the entire testimony of management, the Courts should be quick to examine the proceedings, for this would seem prima facie evidence of bias.

Since the ultimate purpose of the Act would seem to be the promotion of employment and prosperity, and since the Courts clearly have the power to intervene where the purposes of the Act are not being promoted, *International Union of Mine, Mill and Smelter Workers, etc. v. Eagle Pitcher and Smelting Co.*, 325 U. S. 335; *N. L. R. B. v. Sun-*

shine Mining Co., 125 F. 2d 757, 761, it is respectfully suggested that petitioners be granted the opportunity of full exploration at oral argument of the legal issues in this matter.

Respectfully submitted,

M. STUART GOLDIN,
Counsel for Petitioners.

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CITATIONS

Cases:

Federal Communication Commission v. *WJR*, 337 U. S. 265 — 8

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 498 — 7

National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U. S. 344 — 7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

Section 10 (c) — 2

Section 10 (e) — 3

298841—54

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 684

THE L. B. HOSIERY COMPANY, INCORPORATED AND LEE MAISEL, DOING BUSINESS AS MYERSTOWN HOSIERY MILLS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below enforcing the original order of the Board (88 NLRB 1000) is reported at 187 F. 2d 335. The Board's supplemental decisions and orders (R. 4–41, 41–50, 51–52) are reported at 99 NLRB 630 and 102 NLRB 1033. The judgment of the court below (R. 76), enforcing, without opinion, the Board's supplemental orders is not officially reported.

JURISDICTION

The supplemental decree of the court below (R. 77) was entered on January 16, 1954. The petition for a writ of certiorari was filed on April 13, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board's determination of the specific amounts of back pay due to employees under the terms of a decree ordering petitioners to reimburse these employees for loss of pay attributable to petitioners' unlawful discrimination against them is supported by substantial evidence on the record as a whole.

2. Whether, in the circumstances of this case, the court below exceeded the permissible limits of its discretion in failing to afford petitioners an opportunity for oral argument herein.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

> SEC. 10. * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and

shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and

to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT

On April 18, 1951, the court below entered its decree enforcing the Board's order against petitioners which, *inter alia* (88 NLRB 1000), directed petitioners to make whole 13 employees for any loss of pay they had suffered by reason of petitioners' discrimination against them in violation of Section 8 (a) (3) and (1) of the Act (R. 2, 54). Thereafter, petitioners and representatives of the Board were unable to agree as to the specific amounts of back pay due to these employees under the order as enforced and the Board, on notice to petitioners, reopened the record for the purpose of taking evidence and determining the amounts of back pay due these employees. After a hearing, in which petitioners participated and adduced evidence, the trial ex-

aminer issued his supplemental intermediate reports and the Board, adopting in part the examiner's recommendations, issued its Supplemental and Second Supplemental Decisions and Orders in which it determined the net back pay required to be paid to the 13 employees pursuant to the Board's original order as enforced by the court below (R. 2-3, 4-51, 54).

On October 2, 1953, the Board filed its motion in the court below for the entry of a supplemental decree specifying the amounts of back pay due as previously determined by the Board (R. 1-2). In their answer (R. 54), petitioners admitted the correctness of the Board's back pay determination as to six of the employees. They challenged, however (R. 54-56), the back pay awards to the other seven and for the reasons fully stated in their answer they prayed that the court below reduce or vacate the back pay awards to these employees. The Board filed its memorandum in reply to the motion (R. 58-71). Thereafter petitioners filed a motion praying that the court direct the Board to print the transcript of the supplemental proceedings, "order" petitioners and the Board to file briefs following the printing of the record, and hear oral argument in the case (R. 71-73). The court denied petitioners' motion for printing of the record and on the basis of the entire record, including the pleadings, granted the Board's motion (R. 74) and entered its supplemental decree specifying the

amounts of back pay due to each of the named employees, as determined by the Board (R. 76–77).

In substance, petitioners urged in the court below (R. 54–56), as here (Pet. 5, 7), that the back pay awards to the seven employees should be vacated or reduced for the reason that (a) at least two of the four employees previously employed by petitioners as knitters[1] and included in this group would not, even absent discrimination, have remained in petitioners' employ because their jobs had been abolished; (b) that these four employees had, in any event, manifested their intention during the period for which they were awarded back pay not to return to petitioners' employ; and (c) that three of the employees[2] had failed to make reasonable efforts to obtain employment following the discrimination against them, thereby incurring wilful losses. The Board had found that jobs continued to be available to all the knitters discriminated against, that none of the employees had incurred wilful losses, and that none of them had manifested an intention not to return to petitioners' employment during the period for which they were awarded back pay (R. 5–6, 7–8, 9–13, 14, 18–22, 24, 26–31, 33–35, 35–40, 41–44, 44–50, 51).

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[1] These were Howard Kiscaddin, James R. Ludwig, Edwin L. Williamson, Paul Garnet.

[2] These were Frances Matz, Lillian Gassert, Grace Breidigan.

ARGUMENT

1. Petitioners' contention (Pet. 7) that the back pay awards to the seven employees, which it challenges, are not adequately supported by the record presents no question warranting review by this Court. The objections urged by petitioners (*supra*, p. 6) present no more than factual issues which the Board and the court below have resolved adversely to petitioners on the basis of the record as a whole. The resolution of those issues by the court below should be left undisturbed on the basis of this Court's "'usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'" *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503. Moreover, "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346–347. Petitioners have made no such showing here.

2. Petitioners' claim (Pet. 7) that the court below erred in failing to afford them an opportunity to file briefs and to argue the case orally

is likewise insubstantial. There is no suggestion in the record that petitioners were precluded from filing briefs in support of their answer, as did the Board, prior to the entry of the court's order granting the Board's motion for a supplemental decree. Moreover, petitioners' objections in the court below to the back pay awards raised only factual issues which were briefed and discussed by petitioners in their answer to the Board's motion for a supplemental decree (with specific references to those portions of the record relied on by them) and in the Board's reply memorandum. (R. 54–56, 58–71.) Petitioners advance no claim that they have been in any way prejudiced in this respect or that the court below did not give due and full consideration to the matters raised by them in their answer. In these circumstances, there is no basis for any contention that the court, in declining to hear oral argument, exceeded the permissible limits of its discretion. Cf. *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 274–285.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1954.

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